TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 217 49

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C. T. A. D. B. N. OF THE ESTATE OF THEODOSIA HAYNES TAYLOR, ET AL., PLAINTIFFS IN ERROR,

vs.

R. A. DOUGHTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

FILED MARCH 11, 1925

(30,960)

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[fol. 1] **IN SUPERIOR COURT OF WAKE COUNTY**

No. 261, Seventh District

THE WACHOVIA BANK & TRUST COMPANY, Administrator C. T. A. D. B. N. of the Estate of Theodosia Haynes Taylor, and the Wachovia Bank & Trust Co. Guardian of Isaac Montrose Taylor, an Infant,

v.

R. A. DOUGHTON, Commissioner of Revenue of the State of North Carolina

(From Wake)

At Chambers, February 8, 1924

Before Grady, J. Plaintiff Appealed

CONTROVERSY WITHOUT ACTION

There being a question in difference between the parties hereto, which might be the subject of a civil action, the parties hereto agree upon the following case which contains the facts upon which the controversy depends, and do hereby submit the same to the Superior Court of Wake County as fully as though an action had been brought:

Stanford L. Haynes, a resident of Springfield, Massachusetts, died May 21, 1920, leaving a last will and testament which was dated September 15, 1919, which will and testament appointed the Springfield Safe Deposit & Trust Company, of Springfield, Massachusetts, executors and trustee thereof. Said Springfield Safe Deposit & Trust Company duly qualified as trustee and executor under such will.

Mr. Haynes left a large estate, but the only part of his will which is material to this discussion was as follows:

"Fifth, all the rest, residue and remainder of all my goods and estate, both personal and real, of every kind and description, and wherever situated, I give, devise and bequeath to said Springfield [fol. 2] Safe Deposit & Trust Company in trust to hold, manage, control, invest and reinvest in accordance with its best judgment and discretion as follows:

A. One-half of said rest, residue and remainder shall be set apart and kept in a separate trust fund for the benefit of my daughter, Theodosia Haynes, and the net income therefrom shall in quarterly installments be paid to my said daughter as long as she shall live. Upon the death of said Theodosia, I direct that the principal of said trust fund be paid and transferred to such person or persons and in

such proportions as said Theodosia shall by will appoint, or in the event that said Theodosia shall fail to exercise the power of appointment hereby conferred upon her and shall leave issue surviving her, such payment and transfer shall be made to such issue by right of representation."

The daughter, Theodosia Haynes, legatee under the will of her father as above defined, after the death of her father, intermarried with Alexander Taylor of Morgantown, N. C., and at that time changed her residence to the State of North Carolina. On June 23, 1921, Mrs. Theodosia Haynes Taylor died a resident of North Carolina, leaving a last will and testament of which the following is a copy:

"NORTH CAROLINA,
Burke County:

I, Theodosia Haynes Taylor, now resident in Morganton, Burke County, North Carolina, formerly of Longmeadow, Hampden County, Massachusetts, do hereby make, publish and declare this my last will and testament, hereby expressly revoking and declaring void and of none effect any and all wills by me heretofore made, this is to say:

Item 1. I do nominate and appoint my husband, Alexander Taylor, and my father-in-law, Isaac M. Taylor, both of Morganton, Burke County, North Carolina, to be the executors of this my last [fol. 3] will and testament, and it is my will that they serve as such executors without bond.

Item 2. It is my will that all of my just debts, funeral expenses and charges of administering my estate be paid out of my estate as soon as practicable after my death.

Item 3. To my sister, Emily Leonard Haynes, in the event I should die without issue, I give all of the jewelry I possess which formerly belonged to our mother and grandmother.

Item 4. To Katherine K. Taylor, Harriett C. Taylor and Elizabeth M. Taylor, sisters of my husband, Alexander Taylor, in the event I should die without issue, I give in equal shares all of my wearing apparel and jewelry except that hereinbefore given to my sister.

Item 5. To Sarah T. Vernon, wife of James W. Vernon, and sister of my husband, in the event that I should die without issue, I give all of my household linen.

Item 6. Whereas, by subdivision "A" of the fifth clause of the will of my father, Stanford L. Haynes, dated September 15, 1919, one-half of the rest, residue and remainder of said decedent's estate was given to Springfield Safe Deposit & Trust Company of Springfield, Massachusetts, in trust to pay the net income therefrom to me during my life, and upon my death to pay and transfer the principal to such person or persons and in such proportions as I might by will appoint, I now, therefore, in the exercise of said power of

appointment, give, devise and bequeath and direct that said principal be paid and transferred to the persons and in the proportions following, that is to say:

(1) Should I die without issue; one hundred thousand ($100,000) of said principal to Sarah T. Vernon, wife of James W. Vernon, of Morganton, North Carolina, absolutely, or in the event of her prior decease, in equal shares to her sisters, Katherine K. Tay- [fol. 4] lor Harriett C. Taylor and Elizabeth M. Taylor, or to the survivor or survivors of them, and the rest, residue and remainder of said principal to my husband, Alexander, absolutely, or, in the event of his prior decease, in equal shares to my brother, Lawrence S. Haynes and my sister, Emily L. Haynes, or all to the survivor of them.

(2) Should I die leaving issue, then it is my will that said principal shall go to and be held by said Springfield Safe Deposit & Trust Company of Springfield, Massachusetts, in trust, to keep the same safely invested and to pay in quarterly installments one-half of the net income arising therefrom to my husband, Alexander Taylor, for and during the term of his natural life, and the remaining half of said net income in equal amounts to my child or children for and during their respective natural lives, and that upon the death of my said husband the remaining half of said net income shall be paid in equal amounts to such child or children for and during the term of their respective natural lives.

(3) And upon the death of any one of my children, then that part of the principal in the hands of the said Springfield Safe Deposit & Trust Company to the income whereof he or she shall become entitled under this item of my will, shall be transferred and paid over by said Springfield Safe Depos-t & Trust Company to such person or persons and in such proportions as such child may by will appoint, and should any of my children die intestate as to the part of said principal he or she is hereby empowered to dispose of by will, then the survivor or survivors of my children may by will exercise the power of appointment and disposition as to the principal remaining in the hands of said trust company in equal amounts.

Item 7. All the rest, residue and remainder of my goods and [fol. 5] estate, both real and personal, of every kind and description and wherever situate, I give, devise and bequeath to my husband, Alexander Taylor, his heirs and assigns forever.

In testimony whereof, I have hereunto set my hand and seal this 18th day of March in the year one thousand, nine hundred and twenty-one.

Theodosia Haynes Taylor. (Seal.)

Signed, sealed, published and declared by Theodosia Haynes Taylor to be her last will and testament in the presence of us, who at her request and in her presence and in the presence of each other here-

unto subscribe our names as witnesses to the said last will and testament.

Mary Mills, Morganton, N. C., W. A. Harbinson, Morganton, N. C., James W. Gault, Morgantown, N. C."

which will was duly admitted to probate by the Clerk of the Superior Court of Burke County at Morganton, N. C., the — day of ——, 1921.

Isaac Montrose Taylor, an infant son of Mrs. Theodosia H. Taylor, and Alexander Taylor, was the only surviving child of Mrs. Taylor. This child was born about ten days before Mrs. Taylor's death. The executors appointed in item 1 of Mrs. Taylor's will,—her husband, Alexander Taylor, and her father-in-law, Isaac M. Taylor,—renounced the executorship and the plaintiff, the Wachovia Bank & Trust Company, was duly appointed and qualified as administrator c. t. a. d. b. n. of Mrs. Taylor's estate, and guardian of her infant child, Isaac Montrose Taylor.

Mrs. Taylor's estate at the time of her death, June 23, 1921, consisted of a lot of land in Morganton, N. C., valued at $1,000, and personal property located in the State valued at $8,743.84. In addition to this, the value of the estate in trust held by the Spring-[fol. 6] field Safe Deposit & Trust Company, over which she was given the power of appointment by her father's will, was at the time of her death $395,279.93.

The controversy submitted under this agreement arose from the assessment of the latter sum for inheritance tax in the State of North Carolina, as will be more fully set out hereinafter. The General Assembly of 1921, after the death and probate of the will of Stanford L. Haynes, but previous to the death of probate of the will of Mrs. Theodosia H. Taylor, for the first time incorporated in the inheritance tax law of North Carolina the following provision;—

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such ommission or failure in the same manner as though the person or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing exercise such power, taking effect at the time of such omission or failure."

[fol. 7] This took effect March 8th, 1921. This is the concluding clause of section 6, Chapter 34, Public Laws of 1921. Acting under the authority of said provision, the Department of Revenue assessed this trust fund for inheritance tax in the State of North Carolina. The Springfield Safe Deposit & Trust Company holds this fund, which consists entirely of investments in stocks and bonds of various corporations, none of which are North Carolina corporations, under the provisions of the will of Stanford L. Haynes in the City of Springfield, Massachusetts. The appointees and legatees under the will of Mrs. Taylor, to-wit, Alexander Taylor and Isaac Montrose Taylor, were at the time of the execution and probate of the will, and are now, residents of the State of North Carolina. The amount assessed by the Revenue Department as inheritance tax on the share of the husband, Alexander Taylor, in the trust fund in the hands of the Springfield Safe Deposit & Trust Company, is $3,995.65; the amount assessed upon the share of the infant child in such trust estate is $5,317.09, making a total in controversy of $9,312.74, and the Commissioner of Revenue will proceed under the machinery of the statute to collect said sums unless enjoined by the Court under C. S. Section 7979.

The will of Mrs. Taylor is executed in accordance with the laws of Massachusetts.

The matters in difference are:—

1. The jurisdiction and authority of the Department of Revenue to levy the tax.

2. The liability of the plaintiff as administrator and as guardian for the payment of the tax or any part of it.

And as the Court shall determine these questions, the defendant, the Commissioner of Revenue of the State of North Carolina, shall be perpetually enjoined from attempting to collect said inheritance tax, or in the alternative, if this Court should hold with the defendant, judgment shall go against the plaintiff, the amount of said tax [fol. 8] to be paid out of the assets of the estate of Mrs. Theodosia Haynes Taylor.

Wachovia Bank & Trust Co., as Guardian and Administrator, by R. G. Stockton, Sec. R. A. Doughton, Commissioner of Revenue.

(Verified by R. G. Stockton.)

IN SUPERIOR COURT OF WAKE COUNTY

JUDGMENT

This cause having been submitted as a controversy without action under the statute, and upon a case agreed, and coming on to be heard by me at chambers in the City of Raleigh on February 8,

1924, and being heard, it is found that the facts set in the case agreed are correct, and thereupon it is further found as conclusions of law.

1. The power of appointment bestowed upon Mrs. Taylor by the will of her father was a general power, as distinguished from a special power, and it was exercised by her in the State of North Carolina, after the act of 1921, quoted in the case agreed, became effective, and that act taxes the exercise of the power and not the property appointed.

2. Inheritance taxes are made a charge of administration under the Revenue Act, Section 9 of Chapter 34, Public Laws of 1921. The effect then of item 2 of Mrs. Taylor's will is to appoint a sufficient sum from the property over which she had power of appointment to meet debts, funeral expenses and charges of administration, to the extent that it is necessary to resort to it.

Upon motion it is thereupon adjudged that the defendant, R. A. Doughton, Commissioner of Revenue of the State of North Carolina, recover of the plaintiff, Wachovia Bank & Trust Company, administrator c. t. a. d. b. n. of Theodosia H. Taylor, $9,312.74, in- [fol. 9] heritance tax assessed by him upon said estate (which assessment is in all particulars affirmed), out of the assets of said estate in its hands, or which should be in its hands; and that further he recover his costs in this behalf incurred.

This February 9th, 1924.

Henry A. Grady, Judge Riding Courts of 7th District.

From this judgment the plaintiff appeals to the Supreme Court. Notice of appeal waived. Cost bond fixed at $50. The case agreed, the submission to the Court and affidavit, and this judgment, constitute the case on appeal.

Henry A. Grady, Judge.

IN SUPREME COURT OF WAKE COUNTY

ASSIGNMENTS OF ERROR

The plaintiff says that His Honor, Judge Grady, committed error:

1. In adjudging that the power of appointment bestowed upon Mrs. Taylor by the will of her father was a general power, and that the exercise of said power of appointment was subject to an inheritance tax, for that the State of North Carolina is without jurisdiction to legislate with respect to the appointed property, and to levy and collect inheritance taxes upon such property, and to take property without due process of law, in contravention of section 17 of article 1

of the Constitution of the State of North Carolina, and of the Fourteenth Amendment to the Constitution of the United States.

2. In adjudging that the effect of item two of Mrs. Taylor's will is to appoint a sufficient sum from the property over which she had power of appointment to meet debts, funeral expenses and charges of administration.

3. In adjudging that the defendant recover of the plaintiff, as administrator, etc., of Theodosia H. Taylor, Nine Thousand Three Hundred Twelve and 74/100 ($9,312.74) as an inheritance tax.

[fol. 10] 4. In not adjudicating that the Act of 1921, as applied to the facts of this case, is unconstitutional, as being in contravention of the due process clause of the Constitution of the State of North Carolina, and of the United States.

5. In signing the judgment as appears of record.

Manly, Hendren & Womble, Attorneys for Plaintiff.

(Transcript certified by C. S. C.)

[fol. 11] IN SUPREME COURT OF NORTH CAROLINA

DOCKET ENTRIES

Appeal docketed 1 March, 1924; case argued 24 April, 1924; opinion by Stacy, J., 24 January, 1925, as follows:

[fol. 12] IN SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1924

No. 250

THE WACHOVIA BANK & TRUST COMPANY, Admr., et al.,

v.

R. A. DOUGHTON, Commissioner of Revenue

Appeal by Plaintiffs from Grady, J., at Chambers, February 8, 1924, from Wake

Controversy without action, submitted on an agreed statement of facts, the determinative portion of which appears in the opinion of the Court.

From a judgment in favor of the defendant, upholding the validity of the tax, the plaintiffs appeal.

R. G. Stockton, Manly, Hendren & Womble for plaintiffs.

Attorney-General Manning and Assistant Attorney-General Nash for the defendant.

Opinion

Stacy, J.:

There being a question in difference between the parties to this proceeding, which might properly become the subject of a civil action, the same has been submitted for adjudication, on an agreed statement of facts, as provided by C. S. 626.

The question to be determined is the liability or non-liability of the estate of Mrs. Theodosia Haynes Taylor, or the appointees under her will, to an inheritance tax, or transfer tax, levied under the Revenue Act of 1921, upon the exercise in this State, by testamentary instrument, of a certain power of appointment, over property consisting of stocks and bonds in foreign corporations, said power being given and conferred by the will of Stanford L. Haynes who was a resident of the State of Massachusetts at the time of his death, and whose will is probated in that State.

The said Stanford L. Haynes died 21 May, 1920, leaving a last will and testament, bearing date 15 September, 1919, in which he bequeathed certain stocks and bonds of foreign corporations, in trust [fol. 12½] to the Springfield Safe Deposit & Trust Company of Springfield, Mass., for the benefit of his daughter, Theodosia Haynes, and with power of appointment over said property to her by will. The following is the item of said will, pertinent to the present controversy:

"Fifth, all the rest, residue and remainder of all my goods and estate, both personal and real, of every kind and description, and wherever situated, I give, devise and bequeath to said Springfield Safe Deposit & Trust Company in trust to hold, manage, control, invest and reinvest in accordance with its best judgment and discretion as follows:

"A. One-half of said rest, residue and remainder shall be set apart and kept in a separate trust fund for the benefit of my daughter, Theodosia Haynes, and the net income therefrom shall in quarterly installments be paid to my said daughter as long as she shall live. Upon the death of said Theodosia, I direct that the principal of said trust fund be paid and thansferred to such person or persons and in such proportions as said Theodosia shall by will appoint, or in the event that said Theodosia shall fail to exercise the power of appointment hereby conferred upon her and shall leave issue surviving her, such payment and transfer shall be made to such issue by right of representation".

After the death of her father, Theodosia Haynes intermarried with Alexander Taylor of Morganton, N. C., and thereby became a resident of North Carolina. Mrs. Taylor died 23 June, 1921, leaving a last will and testament, which has been duly probated in this State and in which she appointed her husband for a portion of the trust estate and her infant son for the remainder. Her will was executed in conformity with the laws of North Carolina, and it is also suffi

cient in form to meet the requirements of the laws of Massachusetts. Both of the beneficiaries, who take the appointed property under Mrs. Taylor's will, are residents of this State; and The Wachovia Bank & Trust Company is the duly appointed and qualified administrator c. t. a. d. b. n. of the estate of Mrs. Taylor and guardian of her infant son.

[fol. 13] The individual estate of Mrs. Taylor, which is located in North Carolina, amounts to $8,743.84. The assessed valuation of the trust estate in the hands of the Springfield Safe Deposit & Trust Company, which consists entirely of investments in stocks and bonds of various foreign corporations, is placed at $395,279.93.

The defendant claims and has assessed an inheritance tax of $3,995.65 against the husband's share of the appointed property, and $5,317.09 against the share of the infant son in said property, under an amendment to the inheritance-tax laws of North Carolina, incorporated therein for the first time, on 24 Aug. 1920, Sec. 2, Chap. 24 Public Laws, Extra Session 1920 and again on 8 March, 1921, Sec. 6, Chap. 34 Public Laws, 1921, after the death and probate of the will of Stanford L. Haynes, but before the death and probate of the will of Theodosia Haynes Taylor, in words and terms as follows:

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

This provision, added as an amendment to the Revenue Acts of 1920 and 1921, is taken almost literally from a similar act of the State of New York, and it would seem that the interpretation placed upon the New York act by the courts of that state and approved by the Supreme Court of the United States ought to prove quite [fol. 14] helpful and beneficial in the interpretation and construction of our own statute. In at least two cases, substantially similar to the one at bar, the New York Court of Appeals has upheld the tax and sustained the validity of the New York statute. In Re Delano, 176 N. Y., 486, affirmed, sub nom. Chanler v. Kelsey, 205 U. S., 466; In Re Daws, 167 N. Y., 227, affirmed, sub nom. Orr v. Gilman, 183 U. S. 278. We think a like conclusion should be reached in construing our own statute in the present case. "Where

a statute is adopted from another State or Country and the same has been construed by the courts of such State or country it is the general rule that the statute is to be held to have been adopted with the construction so given to it, and particularly where the statute itself does not express an intention to the contrary"—Duncan, J., in People v. Trust Co., 289 Ill., 475.

The amendment, as we understand it, does not attempt to impose a tax upon property having its situs outside of the State, but upon the exercise of a power of appointment within the State. We had occasion to consider the general nature and character of inheritance taxes in the case of Trust Co. v. Doughton, 187 N. C., 263. It would only be a work of supererogation to repeat in substance here what has been so recently said there, and we content ourselves by referring to that case for a discussion of the principles involved. In Magoun v. Bank, 170 U. S., 283, it is said of such taxes: "They are based on two principles: 1. And inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation". The same doctrine was reasserted in Knowlton v. Moore, 178 U. S., 41.

It clearly appears, we think, from the language of the statute, that the Legislature intended to levy an inheritance tax, or transfer tax, on the exercise of the power of appointment; for it is specifically [fol. 15] provided that "such appointment when made shall be deemed a transfer taxable under the provisions of this act".

But it is insisted that the title of the present owners is deduced from the will of Stanford L. Hayes and not from the will of Mrs. Taylor. It would probably be more nearly correct to say that it is derived in part from each, because it is dependent upon both. They must resort to both in order to establish their full title, for the will of neither alone will suffice. But whatever be the exact source or sources of title of those who take the appointed property, it cannot be denied that, in its final analysis, the execution of the power is what gives them the property; and this is the transfer, transaction or change of ownership which is taxed under the statute. Trust Co. v. Doughton, supra.

The last will and testament of Stanford L. Haynes gave his daughter, Theodosia, a power of appointment to be exercised only in a particular manner, to-wit, by will. If the right to take property by bequest or devise be not an inherent or natural one, but a privilege accorded by the State, which it may grant or withhold at its pleasure, it follows that the right to make a will, or to exercise the power of appointment by testamentary disposition, is equally a privilege and equally subject to the taxing power of the State. Speaking to the question in the case of In Re Delano, 176 N. Y., 486, Vann, J., said: "The privilege of making a will is not a natural or in-

herent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others. The legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the privilege. It could exact this condition, independent of the date or origin of the power. All this necessarily flows from the absolute control by the legislature of the right to make a will".

When Stanford L. Haynes gave or devised the property in question to the appointees under the will of his daughter, he necessarily [fol. 16] subjected it to the charge or tax which the State might impose upon the privilege accorded to her of making a will. Had the property passed in default of an exercise of the power of appointment, a very different case would have been presented. In that event, the husband of the testatrix would have taken no part of the trust estate, and her infant son would have taken the entire property under his grandfather's will. We express no opinion on the question whether, under such circumstances, the tax imposed by the amendment of 1921, could be deemed a valid exercise of the taxing power. In Re Canda's Estate, 189 N. Y. Supp., 917.

The recent case of In Re Taylor's Estate, 201 N. Y. Supp., 367, an the cases of In Re Frazier, 188 N. Y. Supp., 189, In Re Seaman, 187 N. Y. Supp., 254, and State ex rel. Smith v. Probate Ct., 124 Minn., 508, are in line with the above position and the decisions cited. See, also, valuable note on the subject in 18 A. L. R. p. 1470.

The exercise of the power of appointment now under consideration took place by the permission and under the direct protection of our laws. This would seem to bring it within the reach and power of the State to Tax. Thomas v. Matthiessen, 232 U. S. 235; Hooper v. Shaw, 176 Mass., 190. The question presented to us is not one of policy for the courts, but one of power for the Legislature. It is peculiarly the function of the law-making body to levy assessments and to devise a scheme of taxation. Trust Co. v. McFall, 128 Tenn., 645; Person v. Watts, 184 N. C., p. 514.

It will be observed that the power of appointment, bestowed upon Mrs. Taylor by the will of her father, is a general power, as distinguished from a special power; and, for the purposes of taxation, the donee of a general power, when an appointment is made thereunder, is usually regarded as the one from whom the estate comes. Hicks v. Ward, 107 N. C., 393; Rogers v. Hinton, 62 N. C., 102; S. C. 63 N. C., 80; United States v. Field, 255 U. S., 257; Chandler v. Kelsey, 205 U. S., 466; 2 Sugden on Powers, p. 25. In this respect, the instant case may be partly distinguishable from the cases cited and relied upon by appellants; but, if not, we must decline to follow them, as we think the act in question is constitutional. It is conceded that, in some of the states, notably Massachusetts and California, apparently contrary views are taken of similar statutes.

[fol. 16½] Walker v. Mansfield, 221 Mass., 600; In Re Bowditch, 208 Pac. (Cal.), 282. But we are disposed to follow the New York decisions, as above indicated.

Plaintiffs take the further position that if the act in question be valid, the tax in strictness is not a succession tax, but a tax on the exercise of the power of appointment, collectible only out of Mrs. Taylor's estate, and that a sufficient amount of her estate will not come into the hands of her administrator to pay the tax. It will be observed that, by the terms of the statute, the exercise of the power, or the appointment when made, is to be deemed a transfer "taxable under the provisions of this act"; and it has been held by us in a number of cases that such taxes, when levied under the statute, are to be dealt with as succession taxes and collected as such in the manner therein provided. Trust Co. v. Doughton, supra. See sections 7, 9, 10 and 12, Chap. 34, Public Laws, 1921.

Upon the record, and as now advised, we think the judgment entered below, upholding the tax, should be sustained.

Affirmed.

[fol. 17] In Supreme Court of North Carolina

[Title omitted]

Judgment

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable W. P. Stacy, Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed.

And it is considered and adjudged further, that the plaintiff Wachovia Bank & Trust Co., and surety, do pay the costs of the appeal in this Court incurred, to wit, the sum of Twenty-nine 45/100 ($29.45) Dollars and execution issue therefor.

[fol. 18] In Supreme Court of North Carolina

[Title omitted]

Petition for Writ of Error

To the Honorable Chief Justice of the Supreme Court of the State of North Carolina:

Your Petitioner, The Wachovia Bank & Trust Company, Administrator, C. T. A. D. B. N., of the Estate of Theodosia Haynes

Taylor, and The Wachovia Bank & Trust Company, Guardian of Isaac Montrose Taylor, an Infant, respectfully represents:

That on the 24th day of January, 1925, The Supreme Court of the State of North Carolina made and entered a final Order and Judgment herein in favor of R. A. Doughton, Commissioner of Revenue of the State of North Carolina, and against the Wachovia Bank & Trust Company, Administrator, etc., of the Estate of Theodosia Haynes Taylor, in which final Order and Judgment, and the proceedings had prior thereunto in this case, certain errors were committed to the prejudice of your Petitioner, all of which will more in detail appear from an Assignment of Errors which is filed with this Petition;

That The Supreme Court of the State of North Carolina is the highest court of said State in which a decision in this matter can be had;

That the said Final Judgment of the Supreme Court of the State of North Carolina was entered in a cause wherein were drawn in question the interpretation, application, and validity of a statute of the State of North Carolina, the same being an Act of the General Assembly of North Carolina and contained in Section 6, Chapter 34, of Public Laws of the State of North Carolina of 1921, stating and providing in part that "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this Act, such [fol. 19] appointment, when made, shall be deemed a transfer taxable under the provisions of this Act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will," as well as the validity of an authority exercised thereunder, and of a Judgment of the Superior Court of Wake County, N. C., adjudging the constitutional validity of such act and authority and the payment by the said Wachovia Bank & Trust Company, Administrator, etc., of the Estate of Theodosia Haynes Taylor, to the said R. A. Doughton, Commissioner of Revenue of the State of North Carolina, of a certain tax lived under said Act, in the sum of Nine Thousand Three Hundred Twelve Dollars and Seventy-four Cents ($9,312.74); the validity of said statute and authority exercised thereunder, as well as the validity of said judgment, being drawn in question on the grounds that the said Act and authority and the said judgment, enforcing the same were repugnant to and in contravention of the "Due Process of Law" clause of the Fourteenth Amendment to the Constitution of the United States, and the decision of the said Supreme Court of North Carolina was in favor of the validity of the said statute and the said authority so drawn in question, and against the constitutional right claimed by the Petitioner.

Wherefore, your Petitioner petitions and prays that a Writ of Error in the Supreme Court of the United States to the Supreme Court of North Carolina may issue in this behalf, for the correction of errors so complained of, and that a transcript of the record,

papers, etc., in this cause, duly authenticated, may be sent to the Supreme Court of the United States, to the end that the errors complained of by your Petitioner may be examined and corrected and such judgment reversed.

And your Petitioner will ever pray.

This, the 13th day of February, 1925.

Wachovia Bank & Trust Company, Administrator, etc., of the Estate of Theodosia Haynes Taylor and Guardian of Isaac Montrose Taylor, an Infant, by Manly, Hendren & Womble, Its Attorneys.

[fol. 20] IN SUPREME COURT OF NORTH CAROLINA

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Chief Justice of the Supreme Court of the State of North Carolina, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of North Carolina, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Wachovia Bank & Trust Company, Administrator C. T. A. D. B. N. of the Estate of Theodosia Haynes Taylor, and the Wachovia Bank & Trust Company, Guardian of Isaac Montrose Taylor, an Infant, and R. A. Doughton, Commissioner of Revenue of the State of North Carolina, in which the said Wachovia Bank & Trust Company was appellant, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of their validity and against the constitutional objections raised by the said Wachovio Bank & Trust Company, Administrator, a manifest error hath happened to the great damage of the said Wachovia Bank & Trust Company, Administrator C. T. A. D. B. N. of the Estate of Theodosia Haynes Taylor, and the Wachovia Bank & Trust Company, Guardian of Isaac Montrose Taylor, an Infant, as by its complaint appears. We, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record of the proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and pro-

ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this the 14 day of February in the Year of our Lord One Thousand Nine Hundred and Twenty-five.

S. A. Ashe, Clerk of the District Court of the United States for the Eastern District of North Carolina. (Seal of United States District Court, Eastern Dist. of N. C., at Raleigh.)

[fol. 21] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

The above entitled matter coming on to be heard upon the Petition of The Wachovia Bank & Trust Company, Administrator, etc., of the Estate of Theodosia Haynes Taylor, and the Guardian of Isaac Montrose Taylor, an Infant, for Writ of Error from the Supreme Court of the United States to the Supreme Court of North Carolina, and upon examination of said Petition and record in said matter, and desiring to give the Petitioner an opportunity to present to the Supreme Court of the United States the questions presented in said matter,

It is ordered that a Writ of Error be, and it is hereby, allowed from this Court to the Supreme Court of the United States, and the Bond presented by the said Petitioner be, and the same is, hereby approved, and a citation to the said R. A. Doughton, Commissioner of Revenue of the State of North Carolina is, at the same time, signed.

W. A. Hoke, Chief Justice of the Supreme Court of North Carolina.

[fols. 22 & 23] BOND ON WRIT OF ERROR FOR $1,000—Omitted in printing

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[fol. 24] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the Wachovia Bank & Trust Company, Administrator C. T. A. D. B. N. of the Estate of Theodosia Haynes Taylor, and the Wachovia Bank & Trust Company, Guardian of Isaac Montrose

Taylor, an Infant, plaintiff in error, and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of North Carolina in the above entitled matter there is manifest error in this:

I

The Supreme Court of the State of North Carolina erred in affirming the judgment of the Superior Court of Wake County, North Carolina, which latter judgment was entered on February 8, 1924, and which upheld the validity of Section 6, Chapter 34, of the Public Laws of the State of North Carolina of 1921, and wherein it was adjudged also that R. A. Doughton, Commissioner of Revenue of the State of North Carolina, recover of the Wachovia Bank & Trust Company, Administrator, etc., of the Estate of Theodosia Haynes Taylor, the sum of Nine Thousand Three Hundred Twelve Dollars and Seventy-four Cents, and which said judgment further adjudged that the tax provided for in said Act is made, and was, a charge of administration, and that the effect of Item Two of the will of Theodosia Haynes Taylor was to appoint a sufficient sum from the property over which she had power of appointment under the will of Stanford L. Haynes to meet debts, funeral expenses and charges of administration, and that the amount of such judgment was to be recovered and paid out of the assets of the estate of the said Theodosia Haynes Taylor in the hands of the said Wachovia Bank & Trust Company, Administrator, etc., of Theodosia Haynes Taylor, or which should be in its hands, because, as construed, and so construed, when applied to the exercise of the power of appointment conferred upon the said Theodosia Haynes Taylor by the will of Stanford L. Haynes, said Act and the authority exercised thereunder takes property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the said Stanford L. Haynes, being at the time of his death which occurred prior to the year 1921, a resident of the State of Massachusetts, and the appointed property being personal property and having its situs [fol. 25] in the State of Massachusetts, and held and possessed, as Trustee, by the Springfield Safe Deposit and Trust Company, of Springfield, Massachusetts under said will probated in Massachusetts no essential privilege necessary to the exercise of said power of appointment and the transfer of said property, depends for its support or legality on the laws of the State of North Carolina; and, further in that in the judgment the individual estate of Theodosia Haynes Taylor, bequeathed and devised to her husband, is compelled to pay the tax so levied not only the tax against that share of the appointed property going to her husband, but also against that share of the appointed property going to the son, and such amount as may be then left unpaid is adjudged to be paid by the Administrator, without regard to the existence and presence in its hands of assets, and so takes the property of the said husband and of the said Administrator to pay the debt of another.

II

The Supreme Court of the State of North Carolina erred in holding and adjudging that the exercise of the power of appointment by Theodosia Haynes Taylor, conferred upon her by the will of her father, Stanford L. Haynes, who was at the time of his death, which occurred prior to the year 1921, a resident of the State of Massachusetts, where his said will was probated and where all of said property, being personal property, had its situs, was subject to the tax provided for in Section 6, Chapter 34, of the Public Laws of North Carolina of 1921, and for the reason that the thing sought to be taxed, to-wit, the exercise of the power of appointment by the will of Theodosia Haynes Taylor executed in conformity to the requirements of the law of Massachusetts, is not within, or subject to, the jurisdiction of the State of North Carolina, said State not having by its laws conferred any right or privilege essential to said transfer.

III

The Supreme Court of the State of North Carolina erred in holding and adjudging that the res sought to be taxed, to-wit, the exercise of said power of appointment, was within the competency and jurisdiction of the said State of North Carolina so as to be subject to any legislation on its part, and hence to levy and collect said tax under the facts of this case is to take property without due process of law, in contravention of the "Due Process of Law" clause of the Fourteenth Amendment to the Constitution of the United States.

IV

The Supreme Court of North Carolina erred in not holding and adjudging that so much of Section 6, of Chapter 34, of the Public Laws of North Carolina of 1921, as provides for a tax upon the exercise of power of appointment, if and when applied to the facts of this case, is unconstitutional, as being in contravention of the "Due Process of Law" clause of the Fourteenth Amendment to the Constitution of the United States.

Wachovia Bank & Trust Company, Administrator c. t. a. d. b. n. of the Estate of Tehodosia Haynes Taylor, and the Wachovia Bank & Trust Company, Guardian of Isaac Montrose Taylor, an Infant, by Manly, Hendren & Womble, Its Attorneys.

[fol. 26] CITATION—In usual form, showing service on Dennis G. Brummett; omitted in printing

[fol. 27] IN SUPREME COURT OF NORTH CAROLINA

CLERK'S CERTIFICATE

I, Edward C. Seawell, Clerk of the Supreme Court of the State of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of all proceedings in a cause lately pending in said Court, entitled, Wachovia Bank & Trust Co. vs. R. A. Doughton, Commissioner of Revenue of the State of North Carolina.

Witness my hand and seal of said Court at office in Raleigh this 10th day of March 1925.

Edward C. Seawell, Clerk of the Supreme Court of the State of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

Endorsed on cover: File No. 30,960. North Carolina Supreme Court. Term No. 419. Wachovia Bank & Trust Company, administrator c. t. a. d. b. n. of the estate of Theodosia Haynes Taylor, et al., plaintiffs in error, vs. R. A. Doughton, Commissioner of Revenue of the State of North Carolina. Filed March 17th, 1925. File No. 30,960.

FILED
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WM. R. STANS
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 319.

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C. T. A. D. B. N. OF THE ESTATE OF THEODOSIA HAYNES TAYLOR, ET AL., PLAINTIFFS IN ERROR,

vs.

R. A. DOUGHTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR.

WILLIAM M. HENDREN,
Attorney for Plaintiff in Error.

CLEMENT MANLY,
B. S. WOMBLE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 319.

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C. T. A. D. B. N. OF THE ESTATE OF THEODOSIA HAYNES TAYLOR, ET AL., PLAINTIFFS IN ERROR,

vs.

R. A. DOUGHTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This case is here on writ of error to the Supreme Court of North Carolina (Wachovia Bank & Trust Company, Admr., etc., *vs.* Doughton, Commissioner of Revenue, 189 N. C. 50) to test the levy of an inheritance tax upon the exercise, within the State of North Carolina, of a power of appointment by the will of a resident

of North Carolina, pursuant to a power created by the will of a resident of Massachusetts, over intangible personal property situate and held within the State of Massachusetts.

The judgment of the State Court—Wake County Superior Court—was entered on February 9, 1924 (R. 5-6), which judgment was affirmed by the Supreme Court of North Carolina on January 24, 1925 (R. 7).

The Federal Question:

The Federal question arises out of the claim that the taxing statute, as construed and applied by the State Court, takes property in contravention of the due process of law clause of the 14th Amendment. The claim has a double aspect: (1), the power or jurisdiction to tax, and (2), that the payment of the tax is adjudged generally against the assets of the estate of the appointer instead of against the respective shares of those to whom the appointment was made. In other words, the individual estate of the appointer which is given to one of the appointees, is taken to pay a tax, not only against that appointee, but against another appointee.

Form and Result of Proceedings in State Court:

In a controversy without action in conformity to N. C. Con. Stat., Sec. 626 (R. 1-5), the validity of the tax and liability of plaintiff in error in its capacity as administrator for payment of the tax, was sustained by both the trial and Supreme courts. In

each of these courts the Federal right was presented and relied upon (R. 5, 6, and 7).

The Taxing Statute:

Effective March 8th, 1921, the General Assembly of North Carolina, by Ch. 34, Public Laws of 1921, added to an existing inheritance tax statute the following:

> "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided for, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

Those portions of the statute supplying method and machinery of collection will be found set out in another division of this brief, viz., the appendix.

Narrative of Facts:

S. L. Haynes, a resident of Massachusetts, died May 21st, 1920, leaving a will bearing date of September 15th, 1919, in which he gave in trust to the Springfield Safe & Deposit Company of Springfield, Massachusetts, the residue of "all my goods and estate, both personal and real," all of which was located outside the State of North Carolina with power of appointment by will to his daughter Theodosia Haynes, who thereafter intermarried with Alexander Taylor, and upon such marriage became a resident of North Carolina.

In due course the will of S. L. Haynes was probated in Massachusetts, where the executor and trustee named in that will qualified.

While a resident of North Carolina, by will dated March 18th, 1921, executed in conformity with the laws of Massachusetts, viz., with three attesting witnesses (North Carolina requiring only two attesting witnesses), Theodosia Haynes Taylor disposed of her individual estate in North Carolina, consisting of real and personal property of the value of $9,743.84, through gifts of specific articles to various persons, with the residue to her husband, and appointed her husband for a part of the income of the trust estate and her infant son for the remainder, which estate at this time consisted of "investments in stocks and

bonds in various corporations, none of which are North Carolina corporations" (R. 5), in the possession of the Springfield Safe & Deposit Company as trustee in Massachusetts, that company being named by Mrs. Taylor in her will executing the power as trustee to hold and distribute the income to the appointees.

In the event of issue of Mrs. Taylor and the failure on her part to appoint, the entire trust estate passed under the will of S. L. Haynes to "such issue by right of representation" (R. 2).

Mrs. Taylor died June 25d, 1921, leaving surviving, her husband and one child. In due course the will of Mrs. Taylor was admitted to probate in the probate court of Burke County, North Carolina. The Commissioner of Revenue claims tax as follows: On the share of the husband, $3,995.65, and on the share of the infant son, $5,317.09. Judgment in the single sum of $9,312.74 was given against the plaintiff in error as administrator (R. 5-6).

ARGUMENT.

The Supreme Court of North Carolina, in its opinion herein, says:

> "The amendment, as we understand it, does not attempt to impose a tax upon property having its *situs* outside of the State, but upon the exercise of a power of appointment within the State. * * * We think the act in question is constitutional."

After noting that the amendment was in terms the same as the New York Act of 1897 (R. 9), and that that act was construed *In re* Delano, 176 N. Y 486, affirmed, *sub-nom;* Chandler *vs.* Kelsey, 205 U. S. 466, and *In re* Dows, 167 N. Y. 227, affirmed, *sub-nom;* Orr *vs.* Gilman, 183 U. S. 278, cases which the Supreme Court of North Carolina thought were "substantially similar to the one at bar," and, hence, under the doctrine of adopting the construction placed upon the statute at the time of its adoption (R. 9-10), were "helpful and beneficial in the interpretation and construction of our own statute," requiring that a "like construction should be reached concerning our own statute in the present case," the court proceeding to an independent consideration of the question. The gist of this part of the opinion is, to complete the transfer or succession it was necessary that the power be exercised and that this was done by Mrs. Taylor while a resident of North Carolina and that the right to do this was a privilege conferred by the laws of North Carolina, and, hence, "subject to the taxing power of the State" (R. 10).

Considered apart from certain fundamental limitations of the power to tax, the language of the statute would seem to cover this and all other cases, but to avoid an imputation of unconstitutionality, the accepted doctrine is to limit such language. The words of the statute may be satisfied by limiting its application to cases where (1) the donor of the power is a resident of North Carolina, or (2) the appointed property is within the State, or, perhaps, (3) where the will exercising the power can be the subject of considera-

tion by the State of the *situs* only through probate by virtue of and under the laws of the State of North Carolina.

To give it any wider or other scope and meaning is, we respectfully submit, to bring it in conflict with constitutional guaranties.

What the amendment (Ch. 34, Public Laws of 1921) attempts to do is to change the common law rule so that for tax purposes the will of the donee of the power and not the will of the donor is the source of the right and title of the appointee. With respect to a resident of North Carolina or property within its jurisdiction, there can be no question of the validity of such provision. *Re* Delano and *re* Dows, *supra.* But it is submitted that this cannot be done as to property beyond the limits of North Carolina and controlled by the will of a non-resident executed and probated prior to the enactment of the amendment of 1921. Especially is this so where the will exercising the power of appointment is executed in such form as to be the subject of probate in the State of the residence of the donor of the power. To such legislative effort may be applied the language of the court in Bingham's Appeal, 64 Pa. 345:

> "Where the *situs*, both of the will containing the power and of the property subject to it, lies beyond the domain of Parliament, it is evident that a statutory construction of the instrument of execution can have no operation upon it. That would be to subject Pennsylvania rights to English domain."

I.

The State is without jurisdiction to legislate with respect to the appointed property and its transfer.

The Fourteenth Amendment forbids the deprivation of property without due process of law by a State. State action through the Legislature is presupposed. If, therefore, the State statute, as construed and applied by the courts, attempts to bring within the jurisdiction of the State's law, persons or subject-matter without properly ~~within~~ it, the extraterritorial application of the statute is unconstitutional.

Pennoyer *vs.* Neff, 95 U. S. 714, 733.

Union Transit Company *vs.* Kentucky, 199 U. S. 194.

Ætna Life Insurance Company *vs.* Dunken, 45 Sup. Ct. Rep. 192.

Frick *vs.* Pennsylvania, 45 Sup. Ct. Rep. 603.

"The power of taxation," observes Field, J., in State Tax on Foreign-held Bonds, 15 Wall. 300, "however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State." Jurisdiction is as necessary to valid legislative action as it is to valid judicial action.

St. Louis *vs.* Ferry Company, 11 Wall. 423-430.

The power to tax must, of necessity, rest upon the valid assumption of an equivalent rendered to the taxpayer and, hence, taxation without such equivalent is a taking of property without due process.

1-A.

The doctrine that jurisdiction is essential to legislative action is applicable to inheritance taxes.

While the tax here involved is not upon property, but upon the right of succession to property, the property being considered as measuring the value of the privilege, nevertheless the same general rule as to jurisdiction is applicable.

The true conception of an inheritance tax is to consider it as upon a right to receive rather than upon the right to dispose of property. At least this is the view taken of it in North Carolina.

Pullen *vs.* Commissioners, 66 N. C. 361.
Re Morris, 138 N. C. 259.

In Pullen *vs.* Commissioners, *supra*, in speaking of the Revenue Act of 1870-1871, imposing a tax on legacies, etc., the Supreme Court of North Carolina said:

> "But we do not regard the tax in question as a tax on property, but rather as a tax imposed on the succession, on the right of the legatee to take under the will, or of a collateral distribution in the case of intestacy."

See also:

Rhode Island Hospital Trust Company *vs.* Doughton, 187 N. C. 263, 266-267.

Such taxes are privilege taxes and a privilege tax is taxable only by the sovereign which confers the privilege. Hence on principle, by analogy, and in the light

of the decisions, abundant ground is found sustaining the statement of the court in Welch *vs.* Barrill, 223 Mass., 87, 111 N. E. 774, that:

> "Jurisdiction for the purpose of imposing a succession tax exists only when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon the law of the state levying the tax."

"All subjects over which the sovereign power of a state extends are" said Marshall, C. J., in McCulloch *vs.* Maryland, "objects of taxation." Not only persons and property may be taxed, but also the privilege of acting within the State, or of taking any benefit from the law of the State. A test of whether the privilege or benefit is derived from a particular State is found in whether the State may refuse the privilege or forbid the act, for whatever the State may refuse or forbid, it may grant or allow only upon the payment of a fee to the State in return for the privilege. This form of fee is called an excise tax.

Nathan *vs.* Louisiana, 8 How. 73.

The converse of this is true also, *i. e.*, whatever may be done or accomplished without the permission or consent of the State cannot be made the occasion or subject of an excise tax. One of the most important privileges granted by the law is that of succeeding to the property of a deceased person. A succession tax is a fee exacted by the State in payment for the service of supplying law and machinery to pass property.

Only the State supplying this law can exact such payment.

* * * * * * *

Since at common law the property appointed under a power of appointment passed by the will of the settlor or donor, there was no succession to tax when the donee exercised the power: Emmons *vs.* Shaw, 171 Mass. 410, 413; White *vs.* White, 189 N. C., 236. Consequently, State statutes were made to contain express provisions taxing the exercise of the power, thus making this act a part of the law of succession and taxable as such. Such State statutes have been upheld as constitutional: Chanler *vs.* Kelsey, 205 U. S. 466; Orr *vs.* Gilman, 183 U. S. 278.

Congress likewise turned its attention to this source of revenue. At first Congress taxed only real successions and hence where the original will antedated the taxing statute, no tax could be imposed: U. S. *vs.* Fields, 255 U. S. 257. This was changed by the Act of Congress of 1918 which expressly levied a tax (an estate tax) to the extent of any property passing under a general power of appointment.

This is an excise tax on the act of appointment and justifies a tax although the will creating the power antedates the act: Pennsylvania Company, etc., *vs.* Lederer, 292 Fed. 629.

These statutes make no attempt, however, to change any fundamental principle of taxation. Their purpose is only to change the rule determining under which will the succession is deemed to take place. Or, to

speak with greater accuracy, to make the exercise of the appointment an essential part of the law of succession. The underlying rules of what the State supplies to the succession were left unchanged, particularly that the law of the domicile of the donor was the governing law as to all questions of propriety and legality of the exercise of the power.

Ultimate and Decisive Question:

Does the State of North Carolina, by its laws, contribute as a *quid pro quo* some benefit or privilege towards accomplishing the succession? Or, to state the question in other words: Can the succession be accomplished apart from the laws of North Carolina? Or, even more concretely, can the succession be accomplished without reference to or aid from the North Carolina probate of the will?

Just here we direct attention to what is, to our minds, a significant circumstance, viz., that the will bears, on its face, evidence that Mrs. Taylor intended it to operate under the laws of the State of Massachusetts because it is attested as required by the probate laws of Massachusetts in that it has three witnesses instead of the two required by the laws of her domicile.

General Propositions:

At common law, powers of appointment have certain well known and well settled attributes and the relations and rights of the parties are equally well known and settled.

For instance:

(1) The appointee takes under the will of the donor and not under the will of the donee of the power:

White *vs.* White, 189 N. C. 236.

U. S. *vs.* Fields, 255 U. S. 257, 263.

(2) The donee has no title to or estate in the appointed property. The power is a deputation of the donee to act for the donor in disposing of the donor's property.

Walker *vs.* Mansfield, 221 Mass. 600.

Shattuck *vs.* Burrage, 229 Mass. 448.

U. S. *vs.* Fields, *supra.*

O'Grady *vs.* Wilmot, (1916) 2 A. C. 231.

(3) The law of the State of the residence of the donor of the power over personal property controls all questions as to the execution of the power and succession to the property.

Walker *vs.* Mansfield, *supra.*

Re Bowditch, 189 Cal. 377.

Re Canda, 189 N. Y. Supp. 917.

2 Woerner, Law of Admr., p. 766.

(4) The interpretation of "will" in the instrument creating the power is for the courts of the State of the domicile of the donor.

Blount *vs.* Walker, 28 S. C. 545.

In re New York Life Insurance & Trust Company, 209 N. Y. 385.

(5) The *res* upon which the decree of the probate court of North Carolina operates is only the status of the "will" for the purpose of distributing the individual estate of Mrs. Taylor.

Blount *vs.* Walker, 134 U. S. 607.
Re Harriman, 208 N. Y. Supp. 672.

Suppose North Carolina had, by statute, withdrawn the privilege of passing property by will, or had surrounded the right by unusual or fantastic requirements. Yet it remains that the will of Mrs. Taylor would be recognized by the law of Massachusetts and there given effect as an exercise of the power.

Higgins *vs.* Eaton, 202 Fed. 75 [229 U. S. 622].
Seawell *vs.* Wilmer, 132 Mass. 131.
Murphy *vs.* Deichler (1909), A. C. 446.

In the last named case, the donee, under an English will of a power of appointment for personalty, to be exercised by deed or will, was domiciled in Germany at the time of her death. Her will, purporting to exercise the power, was duly attested according to the laws of England, but was invalid according to the laws of Germany. It was held that the document was admissible to probate in England for purpose of the appointment.

The question is not so much where the property is located, or whether it is real estate or personal property, but whether the beneficiary comes into its possession through the exercise of a privilege conferred by the taxing State. If the appointee, under the power,

gets all of his rights by reason of the exercise of a power and privilege granted by the taxing State, then, that State is vested with the jurisdiction to tax. And the converse of this is true, to wit: If the appointee can secure his rights under the power without reference to and independent of a privilege granted by the taxing State, then there is no jurisdiction to tax.

State *vs.* Walker, — Mont. —, 226 Pac. 894.

Unless the fact of residence of the donee and the appointees in North Carolina and/or the probate of the will in North Carolina can be said to give jurisdiction or confer the necessary privilege or benefit, there seems to be no room in the case at bar to maintain the jurisdiction to tax.

Cases in Point:

In North Carolina, California, Massachusetts, and New York, the common law rule is that a donee of the power is vested with no interest in the subject-matter and, therefore, passes none by the exercise of the power; that on the exercise of a power by the donee, the property passes, by the will of the donor, as part of that estate, and not as part of the estate of donee, and that the appointee of the donee of the power derives title immediately from the donor.

Massachusetts, California, and New York have a statutory provision similar to that of North Carolina, as contained in the amendment of 1921. The courts

of each of these States holds such an act invalid when applied to facts such as those of the instant case.

Walker *vs.* Mansfield, 221 Mass. 600.
Re Bowditch, 189 Cal. 377.
Re Canda, 189 N. Y. Supp. 917.

For the purposes of the question here presented, the facts of the California and Massachusetts cases are the same as the facts of the case at bar. The only difference, in fact, between the instant case and the New York case of *re* Canda, is that the will of the donee of the power was not probated in the State of New York, but in Massachusetts where the appointed property was located. But this circumstance is, to quote the language of the Massachusetts court, "not a controlling circumstance." That it is not of controlling significance in New York appears from the case of *re* Brett, 205 N. Y. Supp. 154, where the surrogate held that the exercise, by a resident of New York, of a power given by the will of a resident of New Jersey to dispose of property not within the State of New York, is not subject to the tax, though the will exercising the power was probated in New York, and the reason given was that the property passed under the New Jersey law and probate in New York was not necessary to the succession of the property. The opinion of the surrogate was affirmed in 200 N. Y. Supp. 915.

North Carolina Probate:

Since Mrs. Taylor disposed of property of her own located in North Carolina, in addition to the appointed

property, it was not only expedient, but necessary to probate the will in North Carolina.

The whole matter turns upon whether it is necessary for the appointees to seek and have the aid of the laws of the State of North Carolina in order to enable them to receive the appointed property from a non-resident trustee and notwithstanding the statement in the opinion of the Supreme Court of North Carolina herein, that "the exercise of the power of appointment now under consideration, took place by the permission and under the direct protection of our laws," we contend the only circumstance which can supply a basis for the tax is that the will was actually probated in North Carolina.

We respectfully submit that the appointees have the right to demand of and receive from the trustee in Massachusetts the appointed property upon bringing to the attention of the trustees these two facts:

(1) The will of S. L. Haynes, which creates the power of appointment; and

(2) The will of Mrs. Taylor, executed and attested in a way or form recognized by the laws of the State of Massachusetts.

To repeat: Suppose the State of North Carolina had annulled its sanction in the making of wills and the probate thereof, could not Mrs. Taylor, notwithstanding, have made just such will as she did and would it not be in compliance with the power granted her by the will of her father, and when called to the attention

of the trustee, would it not have fulfilled all the conditions of the power and entitled the appointees to the property? If so, how then does the law of North Carolina have to be looked to for any aid in the succession?

The law of North Carolina is not needed either practically or legally to establish the inheritance. A transfer by a gift, *causa mortis*, is governed by the law of the *situs*, so there is no ground for taxing the transfer at the domicile of the decedent. The same is true in the case of appointment by will under a power which derives no force from the inheritance law of the domicile of the person exercising the power. Take the case of personal property having its *situs* in a State which applies its own law without reference to the law of the decedent's domicile. As to such property the law of the domicile grants no privilege to the successor, and it must, therefore, be beyond the power of the domicile to exact a tax from him. The presence of the successor within the State, if the property has already passed to him by the laws of another State, seems to be rather a tenuous ground upon which to predicate a jurisdiction to tax. The taxing State should be required to recognize a title derived elsewhere. The case of *Re* Cummings, 118 N. Y. Supp. 684, seems to furnish a precedent in illustration of this argument. There a decedent left personal property in New York and in California. The California court of probate found the decedent domiciled in that State and distributed the assets found there according to the California law. The New York court found that the de-

ceased died domiciled in New York, but in assessing the New York inheritance tax, it was held that the California assets could not be included. The reason is obvious; that in obtaining those assets the distributees had derived no help from the laws of New York. It all comes to this: Unless a transfer has taken place, which must depend for its validity in some way upon the laws of the taxing State, there is no jurisdiction to tax.

Grounds of North Carolina Opinion:

The Supreme Court of North Carolina finds that the North Carolina statute was, in terms, the same as the New York statute and thought that the construction placed upon that statute by the court of last resort in New York in the cases of *Re* Delano and *Re* Dows, supra, was controlling inasmuch as stated by that court, those cases were "substantially similar to the one at bar." It is respectfully submitted that the Supreme Court of North Carolina misconceived both the question presented in these New York cases and the facts thereof. The question here presented was not presented even remotely in those cases and the essential facts were just precisely the opposite of the facts in the case at bar. The question in those cases was whether where the power was contained in a will which antedated the enactment of the taxing statute the statute could constitutionally be applied. In those cases both the donor and donee were residents of New York where the property was likewise situated and the contention

was; there was no taxing statute in existence at the time the original will spoke and, since the appointee took under the will of the donor, the tax could not be predicated upon the single circumstance that the power was executed subsequent to the enactment of the taxing statute.

While purporting to follow the New York decisions, the court, in addition to misconceiving the force and effect of the cases relied on, likewise either failed to appreciate or, if appreciated, to heed two other cases decided by the courts of New York where the precise question here presented was presented and where the facts were, with respect to the residence of the donor and the *situs* of the property, the same. The cases referred to in this connection are *Re* Canda and *Re* Brett, *supra*.

The Supreme Court of North Carolina was, it is respectfully submitted, in error in declaring that the privilege of making her will was accorded to Mrs. Taylor by the law of North Carolina and that the exercise of the power took place by the permission and under the direct protection of the laws of North Carolina. It is not at all necessary to make a will acceptable to North Carolina, nor is the privilege of the probate laws of North Carolina needed. The only requirement is a will good in Massachusetts. The single circumstance of the probate of the will in North Carolina is not enough to bring the *res* within the power of the courts of North Carolina. Mrs. Taylor's will had a double aspect:

(1) To pass her own estate which was located in North Carolina, and

(2) To pass the appointed property located in Massachusetts.

If she had not definitely had in mind the value and use of the probate laws of Massachusetts as the basis of passing the appointed property, she would have had her will attested in accordance with the laws of North Carolina, which required two witnesses instead of three witnesses, as required by the laws of Massachusetts. Probate in North Carolina was necessary and was with reference to the North Carolina property.

The Tax Against the Son:

The son takes less under the power as exercised than he would had it not been exercised. It was provided in the will of the donor, if the appointor should die with issue and without having exercised the power, that such issue should take under the will of the donor "by right of representation."

In New York, when the will of the donor antedates the enactment of the statute taxing powers of appointment, it has been held that that portion of the statute which authorizes a tax upon a failure to exercise the power is invalid.

Re Lansing, 182 N. Y. 238; 74 N. E. 882.

Speaking with respect to property situate within the State of Massachusetts, the courts of that State in Minot *vs.* Stevens, 207 Mass.; 93 N. E. 973, holds valid that part of the act governing where the power

to appoint is not exercised. While the question was not presented in the later case of Walker *vs.* Mansfield, 221 Mass. 600, where the donor was a resident of Maryland, which was also the *situs* of the appointed property, the court of Massachusetts would seem to have indicated what its holding would be in these words:

> "If she has failed to exercise the power conferred upon her, the devolution of the trust fund to her heirs takes place by virtue of the will of Mr. Boyd, which will will be given efficacy by the law of Maryland, the State of his domicile."

It has been adjudged in New York that where the appointee takes less or no more under the exercise of the power than under the original instrument creating the power, such person takes under the original instrument and where that was executed before the enactment of the statute, the transfer to him is not taxable.

Re Taylor, 200 N. Y. Supp. 321; affirmed 204 N. Y. Supp. 367.

Re Slosson, 216 N. Y. 79; 110 N. E. 166.

Affirmative action on the part of the appointee as by an indicated election not to take under the exercise of the power is not necessary.

Re Chauncey, 168 N. Y. Supp. 1019.

II.

Liability for the Tax as Adjudged:

The tax as assessed (R. 5) is $3,995.65 "on the share of the husband, Alexander Taylor, in the trust fund in the hands of the Springfield Safe Deposit & Trust

Company," and $5,317.09 "upon the share of the infant child in such trust estate." The judgment (R. 5-6) is in the single sum of $9,312.74 against "Wachovia Bank & Trust Company, Administrator, *c. t. a. d. b. n.* of Theodosia H. Taylor" to be paid, "out of the assets of said estate in its hands or which should be in its hands."

The only assets in the hands of the administrator are those belonging to the individual estate of Mrs. Taylor and are not sufficient to pay the tax. If the individual estate of Mrs. Taylor is to pay the tax, then the property of the husband—the individual estate is given to him as residuary legatee—is taken to pay a debt of the son. None of the appointed property has or will come into the possession of the administrator voluntarily or in the due course of its handling. The provision of Mrs. Taylor's will (R., 3) is that the trustee shall pay the net income to the appointees. Only by a suit against the trustee in Massachusetts can the administrator secure possession of the appointed property. Is there imposed on the administrator any such duty? If there is such duty, is there support for such suit? The defendant in error says there is and that it arises out of Item 2 of the will taken in conjunction with Section 20 of the act. Item 2 reads:

> "It is my will that all my just debts, funeral expenses and charges of administering my estate be paid out of my estate."

The argument of the defendant in error is, to use the language of his brief in the State court, to this effect:

> "The effect of this provision of the will is to appoint a sufficient sum from the property over which she had power of appointment to meet debts, funeral expenses and charges of administration.
>
> "It is, then, the duty of her administrator to pay these charges out of her estate, and as there was not sufficient of her estate independent of the property over which she had power of appointment to meet the full amount of these charges, it is its duty to secure these charges from the property appointed by Mrs. Taylor in her will to an amount sufficient to meet the full indebtedness and charges of administration."

Since a discussion of this contention merges into and involves a consideration of the statutory method of enforcing payment of the tax, it will be discussed in connection with the applicable provisions of the statute which will be found as an appendix hereto.

The tax is not an estate tax, but a succession tax, and hence is imposed upon each legacy or distributive share of the estate as it is received: 26 R. C. L. 195, 196. In the last analysis, all taxes are upon persons. The property or privilege intervening between the person and the tax may fix the measure of the tax and afford a source of payment of the tax.

Mr. Chief Justice Vinje, speaking for the court in the recent case of Shepard *vs.* State, 184 Wis. 88, in construing the application of the Wisconsin statute, said:

> "An inheritance or succession tax is a tax on the right to receive property from a decedent. It attaches to a person and not to property or

> to an interest in property, though it is imposed and enforced through a control of the transfer of the property. The only other relation that the property has to it is that its value measures the amount of the tax."

The statute does not make the estate of the decedent liable for the tax. What it does is to impose upon the personal representative a duty to deduct the tax from that portion of the estate in his hands before distribution to particular legatees, devisees or distributees. Estate taxes are paid from the *corpus* of the estate. Succession taxes are paid from the share of a particular person as it passes from the hands of the personal representative into the hands of such person.

See—

United States *vs.* Priest, 210 Fed. 332.
United States *vs.* Fitts, 197 Fed. 1007.

Payment is to be made not out of the *corpus* of the estate, but out of each particular share. So far as a statutory duty is devolved upon the personal representative with respect to payment, that duty is limited to deducting from the legacy or share before payment to the legatee or distributee. The mandate of the statute is that before "paying any legacy or share" the personal representative "shall deduct therefrom"—that is, from the legacy or share—the tax.

Sec. 9 of the Act of 1921.
Hunter *vs.* Husted, 45 N. C. 141.
State *vs.* Bridges, 161 N. C. 246, 256.
26 R. C. L. 220.

Personal liability for the tax is imposed upon the personal representative only when such representative distributes the estate without paying the tax and where there are funds available for that purpose.

Acts 1921, Ch. 34, Sections 9 and 20.

26 R. C. L. 235.

The personal representative is not liable as such for the tax, but only when the property on account of which the tax is levied comes into his possession.

State *vs.* Brevard, 62 N. C. 144.

People *vs.* Union Trust Co., 225 Ill. 168.

Item 2 of the Will:

The declaration of Mrs. Taylor in Item 2 of her will was for the payment of *her* debts and the charges of administering *her* estate, which debts and charges were to be paid out of *her* estate. But the tax is not a debt of Mrs. Taylor, nor is it a charge incurred in the administration of her estate. It is the debt of the appointees and cannot be brought within the language of Item 2 which, as everyone knows, is the "stock" phraseology of wills. That direction is an ancient and common form and ordinarily confers no more than the obligation imposed by law.

Besides, the appointed property does not pass to the administrator. It is in the hands of the trustee in the State of Massachusetts and the direction of Mrs. Taylor's will is that the trustee shall remain in possession of the property and disburse the income thereof to her husband and to her infant son.

The equitable doctrine invoked by the defendant in error is applicable only to debts of the appointor and when applicable it is not fastened upon the personal representative or the estate of the appointor, but makes of the appointee a trustee for the creditor. In Smith *vs.* Gary, 22 N. C. 42, at page 50, the Supreme Court of North Carolina says, in speaking of this doctrine of equity: "But how is this doctrine of equity carried into execution? Not by annulling the appointment or altering the disposition, but by holding the appointee as trustee for the creditor."

Another contention of the defendant in error is that the exercise of the power by Mrs. Taylor is not in accord with the grant of the power in the will of her father and, hence, the attempted exercise is invalid. The direction of Mr. Haynes in his will was that his daughter, Mrs. Taylor, might dispose of "the principal of such trust fund." What Mrs. Taylor did, was to dispose of a portion of the income for life to her husband with the remainder to her child or children with the power of appointment finally over the *corpus* in such child or children. The deduction of the defendant in error from this is, that the infant son takes the *corpus* under her will and consequently the administrator is entitled to its possession. But the exercise of the power is not invalid or unwarranted. Under a general power to appoint an estate in fee, the donee may appoint a lesser or qualified estate, as, for instance, the income for life with power in life tenant to appoint the *corpus*.

Mays *vs.* Beech, 114 Tenn. 544.

4 Ann. Cas. 1189 and note.

If the exercise of the power is not in accordance with the grant of the power and, hence, invalid, then the case is brought within the terms of Mr. Haynes' will with respect to the disposition of the property in the event of a failure to exercise and, in that event, the son takes by virtue of representation under the will of Mr. Haynes and not under the will of Mrs. Taylor. Moreover, the tax as assessed is upon the basis of a valid exercise of the power and, therefore, any question which may arise concerning the rights of the parties in the event of a non-exercise of the power is not before the court.

Conclusion.

We submit that the State of North Carolina is without power and jurisdiction to levy the tax in question, either in part or in whole; that the levy as against the son and his share of the appointed property is invalid and that, even though the tax or some part of it is validly levied, judgment cannot be given against the administrator in manner and form appearing of record.

We respectfully pray the court to reverse the judgment of the Supreme Court of North Carolina and to declare that the levy and the enforcement of the tax take property without due process of law.

Respectfully submitted,

WILLIAM M. HENDREN,
Attorney for Plaintiff in Error.

CLEMENT MANLY,
B. S. WOMBLE,
Of Counsel.

APPENDIX.

The applicable sections of the statute (Chapter 34, Act of 1921) are Sections 8A, 9 and 20 and are herewith quoted:

SEC. 8A. *Collection to be made by sheriff if not paid in two years.*

If taxes imposed by this act are not paid within two years after the death of the decedent, it shall be the duty of the clerk to certify to the sheriff the amount of tax due upon such inheritance, and the sheriff shall collect the same as other taxes, with an addition of two and one-half per cent as sheriff's fees for collecting same; and the sheriff is hereby given the same rights of levy and sale upon any property upon which the said tax is payable as is given in the Machinery Act for the collection of other taxes. The sheriff shall make return to the clerk of the Superior Court of all such taxes within thirty days after collection, to be accounted for by the clerk in monthly settlement with the State Tax Commission as provided by law: *Provided*, that time for payment and collection of such tax may be extended by the State Tax Commission for good reason shown.

* * * * * * *

SEC. 9. *Executor, etc., shall deduct tax.*

The executor or administrator or other trustee paying any legacy or share in the distribution of any estate subject to said tax shall deduct therefrom at the rate prescribed, or if the legacy or share in the estate be not money, he shall demand payment of a sum to be computed at the same rates upon the appraised value thereof

for the use of the State; and no executor or administrator shall be compelled to pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or administrator shall be distributed as is or may be directed by law; and every sum of money retained by any executor or administrator or paid into his hands on account of any legacy or distributive share for the use of the State shall be paid by him to the proper officer without delay.

* * * * * * *

SEC. 20. Any administrator, executor or trustee who shall fail to pay the lawful, inheritance taxes due upon any estate in his hands or under his control within two years from the time of his qualification shall be liable for the amount of said taxes, and the same may be recovered in an action against such administrator, executor or trustee and the sureties on his official bond. Any clerk of the court who shall allow any administrator, executor or trustee to make a final settlement of his estate without collecting the inheritance taxes due by law shall be liable upon his official bond for the amount of such taxes.

The laws of Massachusetts touching the probate of wills is found in Chapters 191 and 192 in the General

Laws of Massachusetts for the year 1921. The applicable sections are here quoted:

CHAPTER 191.

SECTION 1. Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal, except an estate tail, and except as is provided in this chapter and in chapters 188 and 189 and in section 1 of chapter 209. A married woman, in the same manner and with the same effect, may make a will.

SECTION 5. A last will and testament executed in the mode prescribed by the law, either of the place where the will is executed or of the testator's domicile, shall be of the same force and effect as if executed in the mode prescribed by the laws of this commonwealth; provided that such last will and testament is in writing and subscribed by the testator.

SECTION 7. No will, except as provided in this chapter and in chapter 209, shall pass any property, real or personal or charge or in any way affect the same; and no will shall take effect until it has been duly proved and allowed in the probate court. Such probate shall be conclusive as to its due execution.

CHAPTER 192.

SECTION 9. A person interested in a will which has been proved and allowed in any other of the United States or in a foreign country ac-

cording to the laws of such state or country, or in a will which, by the laws of the state or country in which it was made, is valid without probate, may produce to the probate court in any county where there is any property, real or personal, on which such will may operate, a copy of such will and of the probate thereof, duly authenticated, or, if such will is valid without probate as aforesaid, a copy of the will or of the official record thereof, duly authenticated by the proper officer having custody of such will or record in such state or country; and the court shall thereupon assign a time and place for a hearing and cause notice thereof to be given to all persons interested by publication in a newspaper three weeks successively, the first publication to be thirty days at least before the time assigned for the hearing.

Section 10. If at such hearing the court finds from the copies before it and any additional proof as to the authenticity and execution of the will that the instrument ought to be allowed in this commonwealth as the last will of the deceased, it shall order the copy to be filed and recorded, and the will shall then have the same effect as if it had been originally proved and allowed in the probate court in the usual manner.

Section 11. After allowing a will under the two preceding sections, the probate court shall grant letters testamentary on such will or letters of administration with the will annexed, and shall proceed in the settlement of the estate which may be found in this commonwealth in the manner provided in chapter one hundred and ninety-nine relative to such estates.

Office Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 319

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C. T. A. D. B. N. OF THE ESTATE OF THEODOSIA HAYNES TAYLOR, ET AL., PLAINTIFF IN ERROR.

v.

RUFUS A. DOUGHTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR

DENNIS G. BRUMMITT,
Attorney General of North Carolina.

FRANK NASH,
Assistant Attorney General of North Carolina.
For Defendant in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 319

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C. T. A. D. B. N. OF THE ESTATE OF THEODOSIA HAYNES TAYLOR, ET AL., PLAINTIFF IN ERROR.

v.

RUFUS A. DOUGHTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR

Statement of Facts

Stated shortly, the essential facts on this hearing are as follows:

Stanford L. Haynes, a resident of Springfield, Massachusetts, died May 21, 1920, leaving a will which contained the following provisions:

> "Fifth. All the rest, residue and remainder of all my goods and estate, both personal and real, of every kind and description, and wherever situated, I give, devise and bequeath to said Springfield Safe

Deposit & Trust Company in trust to hold, manage, control, invest and reinvest in accordance with its best judgment and discretion as follows:

A. One-half of said rest, residue and remainder shall be set apart and kept in a separate trust fund for the benefit of my daughter, Theodosia Haynes, and the net income therefrom shall in quarterly installments be paid to my said daughter as long as she shall live. Upon the death of said Theodosia, I direct that the principal of said trust fund be paid and transferred to such person or persons and in such proportions as said Theodosia shall by will appoint, or in the event that said Theodosia shall fail to exercise the power of appointment hereby conferred upon her and shall leave issue surviving her, such payment and transfer shall be made to such issue by right of representation."

On June 23, 1921, Mrs. Theodosia Haynes Taylor died a resident of North Carolina, leaving a last will and testament, a copy of which is set out (R. pp. 2 and 3). The effect of this will was to exercise the power of appointment conferred upon the deceased daughter by article fifth of her father's will, set out hereinbefore. She left issue, an infant son, Isaac Montrose Taylor. That exercise resulted in a bequest of half of the income from the property held in trust by the Springfield Safe Deposit & Trust Company of Springfield, Massachusetts, to her husband, Alexander Taylor, for his natural life, and the other half of the income to her infant child, Isaac Montrose Taylor. Her husband, Alexander Taylor, in item seven of her will, is made her residuary legatee and devisee. This will was witnessed by three witnesses as is the requirement in Massa-

chusetts with reference to wills executed in that State, but it was duly admitted to probate by the Clerk of the Superior Court of Burke County, at Morganton, N. C., soon after Mrs. Taylor's death. Her estate at the time of her death, June 23, 1921, consisted of a lot of land in Morganton, N. C., valued at $1,000, and personal property located in the State, valued at $8,743.84. The value of the property, all of which was intangible, held in trust by the Springfield Safe Deposit & Trust Company, over which she exercised the power of appointment, was at the time of her death, $395, 279.93. The defendant in error, R. A. Doughton, Commissioner of Revenue of the State of North Carolina, upon whom is conferred the authority to do so under the statutes of the State, assessed an inheritance tax for the succession of this trust fund in the State of North Carolina upon the share of Alexander Taylor, the husband, $3,995.65, and upon the share of the infant child $5,-317.00, making a total of $9,312.74. This is the amount in controversy on this hearing. Plaintiff in error refusing to pay the inheritance tax so assessed, a controversy without action under the North Carolina statute was submitted to the Superior Court of Wake County, which upheld the validity of the assessment, and thereupon an appeal was taken to the Supreme Court of the State of North Carolina, which affirmed the judgment of the court below. See *Bank v. Doughton*, 189 N. C., p. 50 (R. pp. 9 to 12, inclusive). The plaintiff in error then sued out a writ of error from this Court on the ground, first, that in holding that the will of Mrs. Taylor in directing that her executors should pay the debts, funeral expenses and charges of administration of her estate, appointed so much of that estate as was

necessary to pay the inheritance taxes upon it, offended against the Fourteenth Amendment to the Constitution of the United States; second, that the State of North Carolina had no jurisdiction over the *res*, that being situated in the State of Massachusetts; third, that the exercise of this power of appointment, its efficacy and its effects, were not subject to the control of the State of North Carolina; fourth, that the judgment in the court below in necessary effect takes the property of the husband, Alexander Taylor, and of the plaintiff in error, the Administrator D. B. N. C. T. A., to pay the debt of another; fifth, that the Court erred in not holding that the statute upon which the defendant in error relies as interpreted by the Supreme Court of North Carolina was in contravention of the due process clause of the Fourteenth Amendment.

The statute particularly involved in this cause is the first part of section 6, Chapter 34, Public Laws of 1921, p. 149, and the last part of said section at pp. 152 and 153, and is as follows:

> "From and after the passage of this act all real and personal property of whatever kind and nature which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, whether the person or persons dying seized thereof be domiciled within or out of the State (or if the decedent was not a resident of this State at the time of his death, such property or any part thereof within this State), or any interest therein or income therefrom which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, bargainor, donor, or assignor, or intended

to take effect in possession or enjoyment after such death, to any person or persons or to bodies corporate or politic, in trust or otherwise, or by reason whereof any person or body corporate or politic shall become beneficially entitled in possession or expectancy to any property or the income thereof, shall be and hereby is made subject to a tax for the benefit of the State, as follows, that is to say: . . . . . Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The following points are presented in this brief in behalf of the defendant in error:

(1) The power of appointment given Mrs. Taylor by the will of her father, Stanford L. Haynes (see R. p. 1) was a general power as distinguished from a special power.

(2) The donee of a general power of appointment is in equity considered the owner of the property appointed as to all debts of the donee. Item 2 of Mrs. Taylor's will, which is as follows (R. p. 2): "It is my will that all my just debts, funeral expenses and charges of administering my estate be paid out of my estate as soon as practicable after my death," appoints a sufficient sum from the property over which she had power of appointment to meet debts, funeral expenses and charges of administration, and the terms "charges of administration" include inheritance tax to be assessed upon her estate.

(3) Mrs. Taylor exercised the power in North Carolina after the act of 1921, quoted hereinbefore, had become effective and consequently, her will executed and probated in North Carolina while she was a resident of the State, devising and bequeathing property to only two persons, her husband and child, and both of those persons being residents of the State, must be taken to have been executed in the light of the provisions of the act of 1921.

(4) That act taxes, not the property devolving under the exercise of the power of appointment, but the exercise of that power itself.

(5) It was, then, the duty of her administrator, the plaintiff in error, to pay these charges out of her estate, and if there was not sufficient of her estate independent of the property over which she had power of appointment to meet the full amount of these charges, it is its duty to obtain

them from the property appointed by Mrs. Taylor in her will to an amount sufficient to meet the full indebtedness of the charges of administration, including therein inheritance taxes.

(6) If, however, the Court should determine that the expression used in Mrs. Taylor's will, that her administrator should pay all the charges of administration, does not include inheritance taxes, then and independent of this holding, the action of the defendant in error in assessing inheritance taxes upon the succession of the property in the hands of the Springfield Safe Deposit & Trust Company of Springfield, Massachusetts, was authorized by the statute hereinbefore quoted.

(7) The statute thus interpreted, which interpretation was sustained by the Supreme Court of North Carolina, in no way offended against the Fourteenth Amendment to the Federal Constitution.

ARGUMENT

(1) THE POWER OF APPOINTMENT GIVEN TO MRS. TAYLOR BY THE WILL OF HER FATHER, STANFORD L. HAYNES, WAS A GENERAL POWER AS DISTINGUISHED FROM A SPECIAL POWER.

A general power is one where the donee may appoint whom he pleases: a special or particular power is where the appointment is restricted to specific objects or among particular objects only.

31 Cyc., p. 1040.
Smith v. Gary, 22 N. C., 42 at p. 49.
Rogers v. Hinton, 62 N. C., 101.
Hicks v. Ward, 107 N. C., 392.
Thompson v. Garwood, 3d Wharton (Penn.), 287.
Same case, 31 Am. Dec., 502.
Dana v. Murray, 122 N. Y., 604.

(2) THE DONEE OF A GENERAL POWER OF APPOINTMENT IS IN EQUITY CONSIDERED THE OWNER OF THE PROPERTY APPOINTED AS TO ALL DEBTS OF THE DONEE. ITEM 2 OF MRS. TAYLOR'S WILL, WHICH IS AS FOLLOWS (R. p. 2): "IT IS MY WILL THAT ALL MY JUST DEBTS, FUNERAL EXPENSES AND CHARGES OF ADMINISTERING MY ESTATE BE PAID OUT OF MY ESTATE AS SOON AS PRACTICABLE AFTER MY DEATH," APPOINTS A SUFFICIENT SUM FROM THE PROPERTY OVER WHICH SHE HAD POWER OF APPOINTMENT TO MEET DEBTS, FUNERAL EXPENSES AND CHARGES OF ADMINISTRATION, AND THE TERM "CHARGES OF ADMINISTRATION" INCLUDES INHERITANCE TAX TO BE ASSESSED UPON HER ESTATE.

Smith v. Gary, *supra.*
Rogers v. Hinton, *supra.*

(a) "Of course, the beneficial interest a man takes under execution of a power forms part of his estate, and is according to the nature of the property subject to his debts like his other property; nor indeed, can an appointment be made so as to protect the funds from the debts of the appointee. But equity goes a

step farther and holds that where a man has a general power of appointment over a fund and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets so as to be subject to the demands of his creditors in preference to the claims of his legatees or appointees, but in order to raise this equity, the power must be actually executed, for equity, as we shall see hereafter, never aids the non-execution of the power."

2d Sudgen on Powers, 3 Am. ed., star p. 27.

"A general power is in regard to estates which may be created by force of it, tantamount to a limitation in fee not merely because it enables the donee to limit the fee, but because it enables him to give the fee to whom he pleases."

Thompson v. Garwood, *supra.*

See also:

Brandies v. Cochrane, 112 U. S., 344, at 352.
Manson v. Duncannon, 166 U. S., 533, at 546.
United States v. Field, 255 U. S., 257.

In *Bullen v. Wisconsin*, 240 U. S., 265, Mr. Justice Holmes says:

"The words of Lord St. Leonards apply with full force to the present attempt to escape the Wisconsin inheritance tax: 'To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes.' Sudgen Powers, 8th ed., 396."

(b) Charge is defined in Bouv. Law Dict. as a lien, encumbrance or claim which is to be satisfied out of a specific thing or proceeds thereof to which it applies.

Abramson v. Horner, 80 Atl., 907; 115 Md., 232.

In *Darling v. Rogers,* 22 Wendell (N. Y.), 483, the Court says: "Charge includes payments upon land by devise, as legacies; those by deed as rents, annuities and mortgages; *those by operation of law for public purposes as taxes and assessments.*"

The North Carolina statutes make in distinct terms the inheritance tax a lien or charge against the estate in the hands of the executor or administrator or trustee. Section 7 of Chapter 34, Public Laws of 1921, is as follows:

"All heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes, the settlement of which they may be charged with, by paying the same for the use aforesaid as hereinafter provided."

Section 9 of the same act is as follows:

"The executor or administrator or other trustee paying any legacy or share in the distribution of any estate subject to said tax shall deduct therefrom at the rate prescribed, or if the legacy or share in the estate be not money, he shall demand payment of a sum to be computed at the same rates upon the appraised value thereof for the use of the State; and no executor or administrator shall be compelled to pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said

legatee to pay the same such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or administrator shall be distributed as is or may be directed by law; and every sum of money retained by any executor or administrator or paid into his hands on account of any legacy or distributive share for the use of the State shall be paid by him to the proper officer without delay."

The proviso to section 11 of said act declares:

"That all taxes imposed by this act shall be a lien upon the real and personal property of the estate on which the tax is imposed or upon the proceeds arising from the sale of such property from the time said tax is due and payable and shall continue a lien until said tax is paid and receipted for by the proper officer of the State."

(3) MRS. TAYLOR EXERCISED THE POWER IN NORTH CAROLINA AFTER THE ACT OF 1921 QUOTED HEREINBEFORE HAD BECOME EFFECTIVE, CONSEQUENTLY, HER WILL EXECUTED AND PROBATED IN NORTH CAROLINA WHILE SHE WAS A RESIDENT OF THE STATE, DEVISING AND BEQUEATHING PROPERTY TO ONLY TWO PERSONS, HER HUSBAND AND CHILD, BOTH OF THEM BEING ALSO RESIDENTS OF THE STATE, MUST BE TAKEN TO HAVE BEEN EXECUTED IN THE LIGHT OF THE PROVISIONS OF THE ACT OF 1921.

The privilege of making a will in North Carolina was in itself dependent upon the North Carolina laws. To devise, or bequeath property, or inherit it, is not a natural right. Instead, it is a privilege granted by the State, and like all such privileges, it may be granted upon condition. Consequently, its exercise may be taxed.

In re Morris's Estate, 138 N. C., 259.
Stebbins v. Riley, 268 U. S., 137.

When, then, Mrs. Taylor executed her will in North Carolina, the State of her domicile at the time of her death, she was acting by permission of the laws of that State. That permission may be granted upon such terms as the State may within reason impose and we submit that the taxing of the exercise of the power of appointment was in itself a reasonable requirement of the State law. See cases cited under the next head.

(4) THAT ACT TAXES, NOT THE PROPERTY DEVOLVING UNDER THE EXERCISE OF THE POWER OF APPOINTMENT, BUT THE EXERCISE OF THAT POWER ITSELF.

The act is essentially the same as the New York act construed in the hereinafter cited case. The Court of Appeals of that State in construing a similar statute in *In re Dows*, 167 N. Y., 227, declared that it imposed a tax, not upon property, but upon the exercise of the power of appointment. This is reiterated in *In re Delano*, 176 N. Y., 486.

Indeed, the wording of the act is so definite in this regard as to require no interpretation; in plain terms, it taxes the exercise of the power of appointment by will. Be-

sides, the Supreme Court of North Carolina has, in the instant case, so interpreted the statute, and that interpretation is the law on this hearing.

Orr v. Gilman, 183 U. S., 278.
Chanler v. Kelsey, 205 U. S., 466.

(5) IT WAS, THEN, THE DUTY OF HER ADMINISTRATOR, THE PLAINTIFF IN ERROR, TO PAY THESE CHARGES OUT OF HER ESTATE, AND IF THERE WAS NOT SUFFICIENT OF HER ESTATE INDEPENDENT OF THE PROPERTY OVER WHICH SHE HAD POWER OF APPOINTMENT TO MEET THE FULL AMOUNT OF THESE CHARGES, IT IS ITS DUTY TO OBTAIN THEM FROM THE PROPERTY APPOINTED BY MRS. TAYLOR IN HER WILL TO AN AMOUNT SUFFICIENT TO MEET THE FULL INDEBTEDNESS OF THE CHARGES OF ADMINISTRATION, INCLUDING THEREIN INHERITANCE TAXES.

There could be no practical difficulty in this because the income from the trust fund coming into its hands a single year for the benefit of its ward, the infant child of Mrs. Taylor, would be amply sufficient to pay the child's portion of such inheritance tax. The same may be said with reference to the portion of income bequeathed to the husband of the decedent, Mr. Alexander Taylor. So there would be no necessity at all for a resort to the corpus of this trust in the hands of the Springfield Safe Deposit & Trust Company in Massachusetts. Section 52 of the Consolidated Statutes of 1919 is as follows:

> "The distinction between legal and equitable assets is abolished, and all assets shall be applied in the manner prescribed in this chapter." That chapter is entitled "Administration," and is itself a statutory regulation of the control, regulation and disposition of estates of deceased persons.

In the light of this statute, *O'Grady v. Wilmot*, 2 A. C., 231, tends to sustain the view advanced herein.

(6) IF, HOWEVER, THE COURT SHOULD DETERMINE THAT THE EXPRESSION USED IN MRS. TAYLOR'S WILL, THAT HER ADMINISTRATOR SHOULD PAY ALL THE CHARGES OF ADMINISTRATION, DOES NOT INCLUDE INHERITANCE TAXES, THEN AND INDEPENDENT OF THIS HOLDING, THE ACTION OF THE DEFENDANT IN ERROR IN ASSESSING INHERITANCE TAXES UPON THE SUCCESSION OF THE PROPERTY IN THE HANDS OF THE SPRINGFIELD SAFE DEPOSIT & TRUST COMPANY OF SPRINGFIELD, MASSACHUSETTS, WAS AUTHORIZED BY THE STATUTE HEREINBEFORE QUOTED.

Mrs. Taylor died June 23, 1921. The act was at that time, and had been for some time previous, effective in the State. It plainly taxes the transfer of the property by Mrs. Taylor in exercising the power of appointment conferred upon her by her father's will. It is not necessary in any sense of the word to construe this act as having a retrospective operation. The will of Mrs. Taylor's father, Mr. Haynes, in conferring the power of appointment upon her, authorized Mrs. Taylor to exercise this power of appoint-

ment only by will. There can be no will in a legal sense unless it is made in accordance with the laws of the domicile of the deceased. It is absolutely essential to the validity of the exercise of the power that it should follow that power strictly. It is true that as a general rule the donee of the power is the mere instrument by which the estate is passed from the donor to the appointee, and when the appointment is made, the appointee at once takes the estate from the donor as if it had been conveyed directly to him.

Norfleet v. Hawkins, 93 N. C., 393.
White v. White, 189 N. C., 236.

If, however, the power is to appoint by will, it is necessary that the will should be executed and properly probated in order that the estate should vest in the appointee. There is nothing in this general rule, then, which would prevent the State from taxing the exercise of this privilege, as is done in the instant case.

In *In re Dows*, 167 N. Y., 227, the New York court in construing a statute similar to the one in question, declares that it imposes a tax, not upon property, but upon the exercise of the power of appointment. It proceeds further:

> "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it. The will of Dows, Sr., gave his son a power of appointment to be exercised only in a particular manner, to wit: by last will and testament. If, as said by the Supreme Court of the United

States, the right to take property by devise is not an inherent or natural right, but a privilege accorded by the State which it may tax or charge for, it follows that the rights of a testator to make a will or testamentary instrument is equally a privilege and equally subject to the taxing power of the State. When Dows, Sr., devised this property to the appointees under the will of his son, he necessarily subjected it to the charge that the State might impose on the privilege accorded to the son of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the son himself; that is, for the privilege of succeeding to property under the will."

The Supreme Court of the United States in *Orr v. Gilman*, 183 U. S., 278, at 283, quotes this from the New York decision with approval. Again, in *In re Delano*, 176 N. Y., 486, the same court, again dealing with a similar statute, says:

"The privilege of making a will is not a natural or inherent right but one which the State can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the Legislature sees fit to create. The payment of the same in gross, or of an amount measured by the value of the property affected, may be exacted, or the right be limited to one or more kinds of property and withdrawn as to all others. The Legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of gross or ratable sum for the privilege. It could exact this condition independent of the date

or origin of the power. All this necessarily flows from absolute control by the Legislature of the right to make a will."

This case also was carried to the United States Court under the name of *Chanler v. Kelsey* and was affirmed, 205 U. S., 466. In both of these New York cases the original power of appointment was created long before the enactment of the inheritance tax law taxing the exercise of such powers. The powers, however, were, of course, exercised after the enactment of the law. See also:

State ex rel, Smith v. Probate Court, 124 Minn., 508.
In re Frazier, 188 N. Y. Supp., 189.
In re Seaman, 187 N. Y. Supp., 254.

Following these cases, the Supreme Court of North Carolina interpreted the North Carolina act in accordance with their purport.

(7) THE STATUTE THUS INTERPRETED IN NO WAY, WE SUBMIT, OFFENDS AGAINST THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It would make this brief intolerably long if we followed the learned counsel for the plaintiff in error into an investigation of the numerous New York decisions which have dealt with the New York statute, particularly since its amendment. That probably would result only in a confusion of tongues. It suffices to say that where they apparently conflict with the view contended for here, close investigation of them would show that they depended upon different conditions. Seee note, 18 A. L. R., 1470. We re-

spectfully submit that this Court has already determined the question involved in this case adverse to the contentions of counsel for the plaintiff in error.

In *Orr v. Gilman*, 183 U. S., 278, as said hereinbefore, a power of appointment was created some time previous to the enactment of the New York statute taxing the exercise of such power. The Court, sustaining the New York court in that particular, held:

> "It is true that the property described in the 6th paragraph of the will of David Dows, Sr., was real estate, but under the powers conferred in the will of David Dows, Sr., the trustees had converted the real estate, and held the proceeds as personal property, before the death of David Dows, Jr., and it was this personal property which became vested in the grand-children under the exercise of the power of appointment. The court of appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. Nor are we able to perceive that thereby the plaintiffs in error were deprived of any rights under the Federal Constitution. The rule of law laid down by the New York courts is applicable to all alike, and even if the view of the court of appeals respecting the question was wrong, it was an error which we have no power to review."

In *Chanler v. Kelsey*, 205 U. S., 466, heard on another writ of error to the New York Court of appeals based on the alleged unconstitutionality of that Court's interpretation of the power of appointment, inheritance tax act of 1897, the Court again sustained the act, saying:

"As in *Orr v. Gilman, supra,* we must accept this decision of the New York Court of Appeals, holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New York and for the exercise of which the statute was competent to impose a tax in the exercise of the sovereign power of the Legislature over the right to make a disposition of property by will. *U. S. v. Perkins,* 163 U. S., 625, *Magoun v. Ill. Trust & Sav. Bank,* 170 U. S., 283. We cannot say that property has been taken without due process of law within the protection of the Fourteenth Amendment by the manner in which the Court of Appeals has construed and enforced this statute."

Mr. Justice Holmes dissented in the latter case but did not dissent in *Orr v. Gilman,* and seems at p. 482 to put his dissent largely upon the fact that the power did not require a will to its proper exercise. In this case the power did require a will to its proper exercise.

All of the trust fund in the hands of the Springfield Safe Deposit & Trust Company and located in the State of Massachusetts consisted of intangible personal property. This is admitted by the counsel for plaintiff in error in their brief filed in this case and their admission is sustained by the record upon which the tax was assessed.

Bullen v. Wisconsin, 240 U. S., 265, dealt with the validity of an inheritance tax upon the estate of George Bullen, deceased, and resident of Wisconsin. Bullen formerly had lived in Chicago and continued to do some business there after moving to Wisconsin, which he did in

1892. He kept in Chicago the bonds, stocks and notes constituting the fund, and in 1902 conveyed them to the Northern Trust Company of that city upon certain trusts. In 1904, by virtue of powers reserved he repossessed himself of the fund, but in 1907 he conveyed it to the company upon the former trust again. In the instrument conveying the fund he reserved certain powers over the fund, among others the power to appoint the principal income to such beneficiaries and in default of any appointment during his life-time and in all events after his death the income and principal should be applied, paid over and held as in the deed provided. There are other provisions in the deed of trust which led, in connection with those cited above, the Supreme Court of Wisconsin to hold that an inheritance tax was due on all of this fund as upon a transfer intended to take effect in enjoyment after the donor's death. After holding that the Supreme Court of Wisconsin was fully justified in treating Bullen's general power of disposition as equivalent to the fee for the purposes of the taxing statute, the Court proceeded:

> "The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession, it would be recognized that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the states where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be

taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock. *Blackstone v. Miller*, 188 U. S., 189, 204, 47 L. ed. 439, 444, 23 Sup. Ct. Rep., 277; *Eidman v. Martinez*, 184 U. S., 578, 586, 589, 590, 592, 46 L. ed., 697, 702-705, 22 Sup. Ct. Rep., 515; *Thompson v. Advocate General*, 12 Clark & F. 1, 18, 21, 13 Sm., 153, 9 Jur., 217; *Frothingham v. Shaw*, 175 Mass., 59, 78 Am. St. Rep., 475, 55 N. E., 623; *Re Swift*, 137 N. Y., 77, 88, 18 L. R. A., 709, 32 N. E., 1096; *Mann v. Carter*, 74 N. H., 345, 15 L. R. A. (N. S.), 150, 68 Atl., 130; *Hopkins's Appeal*, 77 Conn., 644, 60 Atl., 657; *Hartman's Case*, 70 N. J. Eq., 664, 62 Atl., 560. The same would be true of a universal succesession established by will, and the notion of privity or identity of person that is recognized in these cases has been carried over to more limited bequests and in some degree to deeds."

Frick v. Commonwealth of Penn., 268 U. S., 473, held that the State could not levy a transfer tax upon the tangible property of a resident decedent when that tangible property is located in another state. In that case the Court says, at p. 494:

"Counsel for the State cite and rely on *Blackstone v. Miller*, 188 U. S., 189, and *Bullen v. Wisconsin*, 240 U. S., 625. Both cases related to intangible personalty which has been regarded as on a different footing from tangible personalty. When they are read with this distinction in mind and also in connection with other cases before cited, it is apparent that they do not support the tax in question."

In *Rhode Island Hospital Trust Co. v. Doughton*, No. 106, October Term, 1925, Chief Justice Taft says in discussing a particular case:

> "In the matter of intangibles, like choses in action, shares of stock and bonds, the *situs* of which is with the owner, a transfer tax, of course, may be properly levied by the State in which he resides."

The various decisions, then, which hold that the State has no authority to tax property located without its territorial bounds or even the transfer of such property when situated without its bounds, so strongly and ably urged by the counsel for plaintiff in error, have no application to the facts in this case. All of the property involved in this hearing is intangible property. Though, then, it was located without the State in the hands of an active trustee, the Springfield Safe Deposit & Trust Company, at Springfield, Massachusetts, that trustee held the legal title only for the purposes, in the first instance, set out in the will of Mr. Haynes, and in the second, those set out in the will of Mrs. Taylor, the latter being a North Carolina will. The trustee had no actual interest in the property itself. All of that interest was in Mrs. Taylor, a resident of North Carolina, and domiciled in North Carolina at the time of her death, and she under such circumstances in a court of equity would be taken as a beneficial owner of the property and she could dispose of it under her will as she chose. That will as executed and probated in North Carolina changes the devolution of that property in such way as to give to her husband an interest in it and her child an interest in it, whereas, under the will of Mr. Haynes, if she

had failed to exercise the power of appointment, all of the beneficial interest—in deed, the property itself—was to go to her issue by right of representation. Any question which might be raised upon the constitutionality of that part of the act which imposes an inheritance tax on the transfer of the property if Mrs. Taylor had failed to exercise her power of appointment is not, of course, involved in this appeal. Most of the contentions of the counsel for the plaintiff in error in their brief would apply much more aptly to the questions involved on this hearing if it was an attack upon that part of the act. If there had been no exercise of the power of appointment by Mrs. Taylor in North Carolina, it might be contended with great force that the statute, which declares, in general effect, that those taking upon such failure should be subject to an inheritance tax, is not applicable to such a situation. See, however, *Minot v. Treasurer*, 207 Mass., 588; *Montague v. State*, 163 Wis., 58; *In re Bartow*, 62 N. Y. Supp., 1000.

The point presented in behalf of the defendant in error is very different. The learned counsel for the plaintiff in error do not allow sufficient force to the distinctions between the exercise of a general power and that of a special power. If their contention that the appointees under Mrs. Taylor's will take strictly under the will of the donor, Mr. Haynes, is sustained, then a very serious question would be raised upon the validity of Mrs. Taylor's exercise of the power, so far as she attempts to create the ulterior limitations as set out in that exercise, for their validity must be determined as of the time of the probate of the will of Mr. Haynes if that contention is correct. It is not correct,

however, simply because the power she exercised was general. The rule is thus stated in 1 Sudgen on Powers (3d Am. ed.), star page 472:

> "To proceed to the immediate point of inquiry:—An important distinction is established between general and particular powers. By a general power we understand a right to appoint to whomsoever the donee pleases. By a particular power it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own children. A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to *limit a fee*, which a particular power may also do, but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes may lead him to do so. It has been held that such a power is within the exception in the old annuity act of estates of which the grantor is seized in fee. Therefore, whatever estates may be created by a man seized in fee may equally be created under a general power of appointment; and the period for the commencement of limitations, in point of perpetuity, is the time of the *execution* of the power, and not of the *creation* of it."

And again at star page 474:

> "In regard to the limitations, they are merely such as a man seized in fee might create; and, as the power is equivalent to the fee, the same estates may be created by force of both. To take a distinction be-

tween a general power and a limitation in fee, is to graps at a shadow whilst the substance escapes. By the creation of the power no perpetuity, not even a tendency to a perpetuity, is effected. The donee may sell the estate the next moment; and when he exercises the power in strict settlement as if he were seized in fee, he creates those estates only which the law permits with reference to the time at which they were raised. If we are to consider the interests of the person who takes until appointment, no perpetuity in regard to him is created beyond the life of the donee of the power. And when the power is executed, it is immaterial to him what estates are created by it, for in whatever mode the fee is disposed of, his estate is defeated. But it certainly is not necessary to advert to his estate, as the grand object if the law's anxiety against perpetuities—the restraint of alienation—is in this case avoided. The donee may, nothwithstanding the estate is limited over to a stranger, dispose of the estate in the same manner as if he were seized in fee."

He then goes on and states, section 6:

"It is well established, therefore, that under a particular power, as a power to appoint to children, no estate can be created which would not have been valid if limited in the deed creating the power."

Each case, it seems, is dependent for its solution on the particular facts which it presents. In this case the Wachovia Bank & Trust Company is the plaintiff in error, not only as Administrator C. T. A. D. B. N. but as guardian of the minor child. In both capacities it has

ample funds out of which to satisfy the claim of the State for inheritance taxes, and on the foregoing authorities we ask the Court to affirm the judgment of the Supreme Court of North Carolina holding the assessment of such taxes valid.

Respectfully submitted,

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